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10 UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 STARLA BRAHAM,

13 Plaintiff,

14 v.

15 AUTOMATED ACCOUNTS, INC, a  
16 Washington Corporation , and  
17 MICHELLE DOE and JOHN DOE,  
18 husband and wife and the marital  
19 community comprised thereof.

20 Defendants.

Case No.: CV-10-385-EFS

PLAINTIFF'S MEMORANDUM  
IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

21  
22 INTRODUCTION  
23

24 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants

25 Michelle Bull and Automated Accounts have filed a motion for summary judgment

1 asserting that Ms. Bull's statements to the Plaintiff threatening garnishment of the  
 2 Plaintiff's wages did not violate the Fair Debt Collection Practices Act (codified  
 3 as amended at 15 U.S.C. §§ 1692-1692p) [hereinafter "FDCPA"].  
 4

5 Defendants are wrong; it has violated the FDCPA in the following ways, as  
 6 alleged in plaintiff's complaint: (1) By representing or implying that nonpayment  
 7 of any debt will result in the garnishment of the lease sophisticated consumer's  
 8 wages when no such action could lawfully be taken; (2) by threatening the least  
 9 sophisticated consumer with taking an action that cannot legally be taken or that is  
 10 not intended to be taken; and (3) by using unfair or unconscionable means to  
 11 collect or attempt to collect [a] debt. These acts by the defendants constitute  
 12 violations of 15 USC §§ 1692e(4), 1692e(5), and 1692f, respectively.  
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14 Accordingly, Plaintiff requests that the Court deny Defendants' motion for  
 15 summary judgment, as Defendants' actions violated the FDCPA.  
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### 18 BACKGROUND

19 In 2008, Plaintiff was injured at her workplace and was treated at Deaconess  
 20 Hospital emergency room. (Braham Dep. 21:10-23:2.) Sometime thereafter,  
 21 Plaintiff was contacted by Defendant Michelle Bull<sup>1</sup> on behalf of Defendant  
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23  
 24 <sup>1</sup> Michelle Bull is the real name of Michelle Doe who is named in the Complaint. Ms. Bull's true name was  
 25 ascertained after the Complaint was filed.

1 Automated Accounts, Inc. in an attempt to collect the medical bill. (Bull Dep.  
2 78:6-14.) After making agreed payments to the Defendants for several months, on  
3 November 2, 2009, a scheduled automatic payment to Defendants did not clear the  
4 Plaintiff's bank. This was due to the now undisputed fact that funds which had  
5 been deposited by the Plaintiff were held by the bank in "pending status". (Braham  
6 Decl. ¶ 10-13.) On November 2, 2009, after speaking with her bank, Plaintiff  
7 explained to Defendant Bull what had happened to the scheduled payment.  
8 (Braham Decl. ¶ 11.) Defendant Bull then wrongfully accused the Plaintiff of  
9 lying to her. (Braham Decl. ¶ 12.) Ms. Bull stated to Plaintiff that she had  
10 discussed the matter with her supervisor and that Defendants were going to start  
11 the process of garnishing the Plaintiff's wages. (Braham Dep. 34:15-21.)  
12 Defendant Bull initiated the topic of garnishment and, when further questioned by  
13 the Plaintiff what she meant, Defendant Bull proceeded to reiterate that she was  
14 going to start the "legal process" of garnishing the Plaintiff's wages. *Id.* At no  
15 time has any Defendant herein obtained a judgment against the Plaintiff or  
16 otherwise possessed any legal right to garnish the Plaintiff's wages. Defendant  
17 Bull's statements caused the Plaintiff emotional distress. (Braham Decl. ¶ 20.)  
18 This action against Defendants for Ms. Bull's illegal threat, pursuant to 15 USC §  
19 1692, et seq. was thereafter timely commenced.  
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Ms. Bull tells a slightly different uncorroborated, but materially indistinct version of events. She states that the conversation regarding garnishing the Plaintiff's wages was initiated by the Plaintiff. (Bull Dep. 80:11-16.) In her version of events, Ms. Bull admits that she told the Plaintiff that the Defendants had decided to "start the legal process". (Bull Dep. 81:12-14.) When she made this comment, Defendant Bull testifies she meant that she was going to request an assignment of the account from the creditor – an internal procedure carried out by debt collectors such as Ms. Bull at Automated Accounts, Inc. (Bull Dep. 82:10-15.) Thereafter, when the Plaintiff asked her if the "legal process" she just mentioned means garnishing her wages, Defendant Bull told her that it does. (Bull Dep. 81:22-82:5.) Defendant Bull justifies her statement only by pointing out that she is technically correct as garnishment is part of a "legal process," just not the same "legal process" that she had previously referenced to the Plaintiff. (Bull Dep. 82:6-9.) Defendants now argue that because Defendant Bull's statement was technically truthful under one possible interpretation of her statement, that she could not have violated the FDCPA. ECF No. 27 at 18:21-22. Defendants are wrong.

## LEGAL STANDARD

### A. Standard for Summary Judgment

The entry of summary judgment is inappropriate where there exists a genuine and material issue of fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-

1 48, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Substantive law defines  
2 which facts are material and only disputes over facts that might affect the outcome  
3 of the case will defeat summary judgment. *Id.* at 248, 106 S. Ct. at 2510. A  
4 factual dispute is genuine if a “reasonable jury could return a verdict for the  
5 non-moving party.” *Id.* Although all inferences to be drawn from the underlying  
6 facts must be viewed in the light most favorable to the non-moving party, once the  
7 movant has met their burden of demonstrating the absence of a genuine issue of  
8 material fact, the party opposing summary judgment “must do more than simply  
9 show that there is some metaphysical doubt as to the material facts” to prevent its  
10 entry. *Matsushita Electric Indus. Co. v. Zenith Radio*, 475 U.S. 547, 586-87, 106  
11 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986).  
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15 Defendants cite to a line of cases beginning with *Villiarimo v. Aloha Island*  
16 *Air, Inc.*, 281 F.3d 1054, 1059 (9th Cir. 2002) in support of the proposition that  
17 Plaintiff’s own testimony about her conversation with Defendant Bull is  
18 “uncorroborated”, “self-serving” and otherwise insufficient evidence to avoid the  
19 Court granting Defendants’ Motion for Summary Judgment. Defendants misstate  
20 the law. In fact, the analysis of a similar situation was specifically analyzed and  
21 rejected by the ninth circuit.  
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1 In *S.E.C. v. Phan*, 500 F.3d 895, 910 (9th Cir. 2007), the Court,  
 2 distinguishing the facts before it from those present in *Villiarimo*, stated:

3  
 4 The declaration [in *Villiarimo*] in question included facts beyond the  
 5 declarant's personal knowledge and “provide[d] no indication how she  
 6 knows [these facts] to be true.” *Id.* at 1059 & n. 5, 1061. Phan's and  
 7 Yang's declarations do not have a similar defect, as they involve the  
 8 declarant's own actions. The personal actions of Phan and Yang are  
 9 central to Wu's obligation to repay Hartcourt for the stock, especially  
 10 as the record shows that Wu was basically a figurehead rather than an  
 11 independent actor.

12 *Moreover, it is unremarkable that the defendants could not otherwise*  
 13 *corroborate their personal conversations. That is likely to be the case*  
 14 *regarding most conversations between two people, and does not*  
 15 *disqualify either participant from testifying about the interchange-*  
 16 *subject, of course, to a credibility determination by the finder of fact.*  
 17 The district court was thus wrong to disregard the declarations as  
 18 “uncorroborated and self-serving.”

19 *S.E.C. v. Phan*, 500 F.3d 895, 910 (emphasis added)

20 In *S.E.C.*, as here, the testimony to which the Defendants object is the  
 21 Plaintiff's testimony regarding a conversation between herself and Defendant Bull,  
 22 and her explanation of the emotional distress she suffered as a result of that  
 23 conversation. Ms. Bull and Ms. Braham were the only parties to the conversation  
 24 in question. ECF No. 26 ¶ 49. Neither the Plaintiff's testimony regarding her  
 25 conversation with Defendant Bull nor her testimony regarding her emotional  
 distress requires independent corroboration. The Court should therefore consider  
 the Plaintiff's testimony.

1           There is a dispute as to the precise language used by Defendant Bull in her  
2 exchange with the Plaintiff. Whereas the Plaintiff states that Ms. Bull explicitly  
3 told her that her wages would be garnished (Braham Dep. 34:14-21.), Ms. Bull  
4 acknowledges the verbal exchange but testifies that her comments regarding  
5 garnishing the Plaintiff's wages were less direct. ECF No. 29 ¶ 2-4; ECF 26 ¶ 30-  
6 44.  
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9           In an attempt to discredit the Plaintiff, Defendants' make a meritless  
10 comment based solely on an out of context deposition excerpt. Defendants argue  
11 that Plaintiff has admitted she does not know what words Ms. Bull used during the  
12 conversation. ECF No. 26 ¶ 46-47. Defendants claim that the Court should use  
13 this excerpt as a basis to, not only weigh credibility of the witnesses, but to exclude  
14 the Plaintiff's testimony all together. ECF No. 27 at 13-15, 25-27. Approximately  
15 fourteen (14) pages of deposition testimony after the Plaintiff had finished  
16 testifying to what was said during her telephone conversation with Ms. Bull,  
17 Defendants' counsel attempted to get Ms. Braham to agree that Ms. Bull had used  
18 a particular phrase during her conversation with Ms. Braham. (Braham Dep. 49:4.)  
19 Ms. Braham responded to Defense counsel that Defense counsel's words "are not  
20 the exact words." *Id.* (see also: Braham Decl. ¶ 16.)  
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1 The parties agree that at no time did the defendants have any right to garnish  
2 the Plaintiff's wages. ECF No. 4 at 5. It is the Plaintiff's position that even the  
3 language *admittedly* used by Ms. Bull is a violation of the FDCPA, and has  
4 accordingly also moved this Court for Summary Judgment. If the Court disagrees  
5 with Plaintiff's assertion, however, then a genuine issue of material fact still exists  
6 with respect to the precise language used by Ms. Bull in her verbal exchange with  
7 the Plaintiff.  
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10 "Specifically, Local Rule 56.1 requires the moving party to provide 'a statement  
11 of material facts as to which the moving party contends there is no genuine issue.'" *Raube v. American Airlines, Inc.*, 539 F. Supp. 2d 1028, 1031 (quoting: *Ammons v.*  
12 *Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817 (7th Cir.2004). "It is only when  
13 the witnesses are present and subject to cross-examination that their credibility and  
14 the weight to be given their testimony can be appraised. Trial by affidavit is no  
15 substitute for trial by jury which so long has been the hallmark of 'even handed  
16 justice.'" *Poller v Columbia Broadcasting* (1962) 368 U.S. 464, 473, 82 S.Ct. 486  
17 491. Defendant's urge the court to fully disregard the Plaintiffs' testimony. This  
18 is a premise that is wholly inappropriate for the purposes of summary judgment.  
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1           B. The “Least Sophisticated Debtor” Standard Is Used to Analyze  
 2           Violations of the FDCPA

3           The FDCPA states that its purpose, in part, is “to eliminate abusive debt  
 4 collection practices by debt collectors.” 15 U.S.C. § 1692(e). It is designed to  
 5 protect consumers from unscrupulous collectors, whether or not there is a valid  
 6 debt. *Baker v. G.C. Services*, 677 F.2d 775, 777 (9th Cir. 1982). The FDCPA  
 7 broadly prohibits unfair or unconscionable collection methods; conduct which  
 8 harasses, oppresses or abuses any debtor; and any false, deceptive or misleading  
 9 statements, in connection with the collection of a debt. 15 U.S.C. §§ 1692d,  
 10 1692e, and 1692f.  
 11

12  
 13           The U.S. Court of Appeals for the Ninth Circuit has held that whether a  
 14 communication or other conduct violates the FDCPA is to be determined by  
 15 analyzing it from the perspective of the “least sophisticated debtor.” *Swanson v.*  
 16 *Southern Oregon Credit Serv.*, 869 F.2d 1222, 1225 (9th Cir. 1988). “The basic  
 17 purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA  
 18 protects all consumers, the gullible as well as the shrewd.” *Clomon v. Jackson*,  
 19 988 F.2d 1314, 1318 (2d Cir. 1993). “While protecting naive consumers, the  
 20 standard also prevents liability for bizarre or idiosyncratic interpretations of  
 21 [statements by debt collectors] preserving a quotient of reasonableness and  
 22 presuming a basic level of understanding and willingness to read with care.”  
 23  
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1 *U.S. v. Nat'l Fin. Serv.*, 98 F.3d 131, 136 (4th Cir. 1996) (citations omitted); *see*  
 2 *also Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Bentley v. Great Lakes*  
 3 *Collection Bureau*, 6 F.3d 60 (2d Cir. 1993); *Jeter v. Credit Bureau*, 760 F.2d 1168  
 4 (11th Cir. 1985); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Avila v.*  
 5 *Rubin*, 84 F.3d 222, 226-27 (7th Cir. 1996) (“the standard is low, close to the  
 6 bottom of the sophistication meter”).  
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 9 “As the FDCPA is a strict liability statute, proof of one violation is sufficient  
 10 to support summary judgment for the plaintiff.” *Cacace v. Lucas*, 775 F. Supp.  
 11 502, 505 (D. Conn. 1990); *see also Stojanovski v. Strobl & Manoogian, P.C.*, 783  
 12 F. Supp. 319, 323 (E.D. Mich. 1992); *Riveria v. MAB Collections*, 682 F. Supp.  
 13 174, 178-9 (W.D.N.Y. 1988). “Because the Act imposes strict liability, a  
 14 consumer need not show intentional conduct by the debt collector to be entitled to  
 15 damages.” *Russell v. Equifax A.R.S.*, *supra* at 33; *see also Taylor v. Perrin*  
 16 *Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Bentley v.*  
 17 *Great Lakes Collection Bureau*, *supra*, at 62; *Clomon v. Jackson*, *supra*, at 1318.  
 18 Furthermore, the question of whether the consumer owes the alleged debt has no  
 19 bearing on a suit brought pursuant to the FDCPA. *McCartney v. First City Bank*,  
 20 970 F.2d 45 (5th Cir. 1992); *Baker v. G.C. Services Corp.*, *supra*, at 777.  
 21  
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Whether the Defendants violated the FDCPA must be evaluated from the standpoint of the least sophisticated debtor. Here, although it is irrelevant to the Court's determination of whether or not the Defendants violated the FDCPA, Plaintiff has testified that she was *actually deceived* by the communication at issue (Braham Decl. at 4.) and Defendants essentially concede that this Plaintiff is more sophisticated than the "least sophisticated debtor". ECF No. 26 at 12. Since a person who is more sophisticated than the legal standard requires was actually deceived by the debt collector's communication, the Court should find as a matter of law that the communication is deceptive and therefore deny Defendant's Summary Judgment Motion.

### III. ARGUMENT

#### A. Defendants Violated 15 USC §1692e(4)(5) and (10)

In relevant part, 15 USC §1692e states:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

As stated above, whether a communication is false, deceptive, or misleading is determined from the perspective of the “least sophisticated debtor”. See *Swanson, Supra*. “Under this test, a statement is false or misleading if “it can be reasonably read to have two or more meanings, one of which is inaccurate.” *Goodrow v. Friedman & MacFadyen, P.A.*, 788 F. Supp. 2d 464, 472 (E.D. Va. 2011)(citing: *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 455 (3d Cir.2006) (citation omitted)); See also: *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008) .

The fact that a statement may be technically truthful if considered in a specific context is irrelevant. The case cited by the Defendants, *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098 (9th Cir. 1996) in support of this position is not on point and does not, as Defendants claim, hold that technical truth is a shield to a claim of deception under the FDCPA. Rather, “The test requires a court to consider a statement's ‘capacity ... to mislead,’ such that ‘evidence of actual deception is unnecessary.’” *Id.* (citing: *Nat'l Fin. Servs.*, 98 F.3d at 139). Whether there is truth in one possible context of the statement is irrelevant to a finding of liability under the FDCPA.

In their memorandum in support of summary judgment on the issue of whether Defendants violated 15 USC §1692e, Defendants set forth only the self-serving, paraphrased, testimony of Automated Accounts, Inc.’s own employees. It wholly ignores the Plaintiff’s deposition testimony which states that Defendant Bull unequivocally threatened to garnish her wages – an action that Ms. Bull could not legally take and had no intention of taking, and that indisputably violates 15

1 USC §1692e. While Plaintiff argues that even the statements Ms. Bull admits to  
 2 telling the Plaintiff violate the FDCPA, simply considering the evidence in the  
 3 light most favorable to the Plaintiff, the Defendants' motion on this issue must be  
 4 denied.

5 B. Defendants violated 15 USC 1692d

6  
 7 In relevant part, 15 USC §1692d states: "A debt collector may not engage in  
 8 any conduct the natural consequence of which is to harass, oppress, or abuse any  
 9 person in connection with the collection of a debt."  
 10

11 On November 2, 2009, after the Plaintiff informed Defendant Bull that she had  
 12 deposited funds in her bank account and that her bank had informed her that the  
 13 funds were in a "pending status," Ms. Bull accused the Plaintiff of lying to her.  
 14 (Braham Dep. 32:14-19.) Nothing in the record indicates that Ms. Braham had  
 15 been in any way untruthful with Ms. Bull in the past and Ms. Bull provides no  
 16 basis for her highly offensive statement.  
 17

18 Plaintiff agrees with Defendants that a determination of whether the "natural  
 19 consequence" of a debt collector baselessly accusing a consumer of lying is a  
 20 violation of 15 USC §1692d can be determined as a matter of law. It is. In  
 21 *Chiverton v. Fed. Fin. Group, Inc.*, 399 F. Supp. 2d 96, 101 (D. Conn. 2005), the  
 22 Court found that "The defendant violated § 1692d(2) by calling [the Plaintiff] a  
 23 'liar.'" In so holding, court in Chiverton cited to the *Federal Trade Commission*,  
 24 *Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed.Reg. 50097,  
 25 50105 (1988) noting: "Abusive language includes religious slurs, profanity,  
 obscenity, calling the consumer a liar or a deadbeat, and the use of racial or sexual

1 epithets.” See also: *Moore v. Firstsource Advantage, LLC*, 07-CV-770, 2011 WL  
 2 4345703 (W.D.N.Y. Sept. 15, 2011)(“ The use of abusive language by a debt  
 3 collector, including calling a debtor a “liar,” can constitute harassment in violation  
 4 of the FDCPA”); *Nelson-McGourty v. L & P Fin. Adjusters Inc.*, 08-CV-2849,  
 5 2010 WL 3190711 (N.D. Ill. Aug. 12, 2010).

6 Accordingly, the Court, should therefore deny Defendants’ Motion on this  
 7 basis.  
 8

9 C. Plaintiff is Entitled to Emotional Distress Damages

10  
 11 In their motion for summary judgment, Defendants incorrectly argue that  
 12 Plaintiff cannot maintain a claim for emotional distress damages under the FDCPA  
 13 by testifying about her emotional distress experienced as a result of the debt  
 14 collector’s actions. Defendants rely on a single unpublished case to support its  
 15 position. *Costa v. Nat’l Action Fin. Servs.*, Case No. S05-2084, 2007 WL  
 16 4526510 (E.D.Cal. Dec.19, 2007) (Damrell, J.). The Ninth Circuit has not ruled on  
 17 the issue although, other district courts have disagreed with *Costa* and held that  
 18 emotional distress damages are available under the FDCPA so long as the Plaintiff  
 19 tenders evidence substantiating that she suffered emotional distress as a result of  
 20 the defendant's FDCPA violations. See *Panahiasl v. Gurney*, Case No. 04-04479,  
 21 2007 WL 738642 (N.D.Cal. Mar.8, 2007); see also *Boris v. Choicepoint Servs.*,  
 22 *Inc.*, 249 F.Supp.2d 851 (W.D.Ky.2003).  
 23  
 24  
 25

1 “The FDCPA's drafters were greatly concerned about emotional harms  
 2 inflicted by abusive debt collectors.” *Davis v. Creditors Interchange Receivable*  
 3 *Mgmt., LLC*, 585 F. Supp. 2d 968, 972-77 (N.D. Ohio 2008). “The Congressional  
 4 findings note that abusive debt collection causes “marital instability” and  
 5 “invasions of individual privacy” along with economic harms like “personal  
 6 bankruptcies” and “loss of jobs.”” *Id.* (citing: 15 U.S.C. § 1692(a)). “The Senate  
 7 Committee noted that abusive debt collectors cause “suffering and anguish.”” *Id.*  
 8 (citing: S. Rep. 95-382, at 2, *U.S. Code Cong. & Admin. News* 1977, pp. 1695,  
 9 1696.). The Committee expressed concern about practices that take a primarily  
 10 emotional toll...*Id.*

11  
 12  
 13  
 14 In *Riley v. Giguere*, 631 F. Supp. 2d 1295, 1314-16 (E.D. Cal. 2009), the  
 15 Court held:

16  
 17 Under the FDCPA, the plaintiff may recover for “any actual damage  
 18 sustained” as a result of the violations. 15 U.S.C. § 1692k(a)(1). In  
 19 considering the proof required to substantiate a damage award for  
 20 violations of the FDCPA, courts have noted the statute's similarity to  
 21 the Fair Credit Reporting Act (FCRA). *See Costa*, 2007 WL 4526510  
 22 at \*7; *Panahiasl*, 2007 WL 738642 at \*1-2; *Smith v. Law Offices of*  
 23 *Mitchell N. Kay*, 124 B.R. 182, 185 (D.Del.1991). Like the FDCPA,  
 24 the FDRA [sic] has the purpose of protecting consumers from unfair  
 25 practices. *See* 15 U.S.C. § 1681 (FCRA statement of purpose). The  
 damages provision of the FCRA is virtually identical to that of the  
 FCDPA, providing that a person who negligently or willfully fails to  
 comply with the provisions of the statute is liable for “any actual  
 damages sustained by the consumer.” 15 U.S.C. §§ 1681n, 1681o; *see*  
*also* 15 U.S.C. § 1692k(a)(1) (damage provision of the FDCPA). The



1 Ninth Circuit has held that “actual damages” under the FCRA  
 2 includes recovery for “emotional distress and humiliation.” *Guimond*  
 3 *v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). In  
 4 reaching this conclusion, it relied on decisions of the Fifth and Eighth  
 5 Circuits Courts of Appeals, which had held that emotional distress  
 6 damages were compensable under the FCRA upon plaintiff's showing  
 7 that he actually suffered symptoms of emotional distress. *Id.*, citing  
 8 *Johnson v. Dep't of Treasury, I.R.S.*, 700 F.2d 971 (5th Cir.1983) and  
 9 *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir.1976).  
 10 The court can find no reason why the same standard would not apply  
 11 to the damages provision of the FDCPA. Both statutes have similar  
 12 purposes and both include identical provisions regarding a plaintiff's  
 13 recovery for actual damages. In holding that the plaintiff must prove  
 14 the elements of an intentional infliction of emotional distress claim  
 15 under California law in order to recover for emotional distress  
 16 damages, the *Costa* court reasoned that “the FDCPA expressly  
 17 requires to recover above and beyond statutory damages, definable  
 18 actual damages.” *Costa*, 2007 WL 4526510 at \*8; *see also Bolton*,  
 19 2009 WL 734038 at \*9-10 (citing same). However, the FCRA has the  
 20 same requirement and the Ninth Circuit held that this standard is met  
 21 simply by plaintiff tendering evidence of his actual emotional distress,  
 22 without incorporating the state law's tort elements. *See Guimond*, 45  
 23 F.3d at 1333.

24 Moreover, under the FDCPA, the defendant's subjective intent  
 25 is not a necessary element for the plaintiff's recovery. *Clark v. Capital*  
*Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1174-77 (9th  
 Cir.2006). It appears illogical-and certainly defendant has directed the  
 court to no authority in support of this position-for the court to  
 presume that Congress intended for the plaintiff to be required to  
 prove that defendant intentionally caused him emotional distress in  
 order to recover for such damages, when defendant's subjective intent  
 is in no other way relevant to plaintiff's recovery. Such a construction  
 of the statute appears particularly insupportable in light of the fact that  
 Congress did permit a court to reduce the damage award if there was  
 evidence that defendant did not intend to violate the FDCPA but that  
 its conduct was the result of a bona fide error. 15 U.S.C. § 1692k(c);  
*see also Clark*, 460 F.3d at 1174-77. Put plainly, it is not proper for  
 the court to insert an intent requirement into plaintiff's recovery for  
 emotional distress damages where Congress has not done so and



1 where Congress expressly provided for the role defendant's intent  
2 should have in a FDCPA claim.

3 Thus, although the issue has not yet been taken up by the Ninth Circuit, District  
4 Courts in the Ninth Circuit and across the country have rejected the reasoning in  
5 *Costa*.  
6

7 The Western District of Washington has also addressed the matter of  
8 emotional distress damages and specifically disagreed with the holding in *Costa*.  
9 There, the Court held that:  
10

11 “The court is persuaded by the *Riley* court's analysis, and, like  
12 *Riley*, holds that “actual damages” under the FDCPA includes  
13 emotional distress damages. Although Ms. Healey admits that she did  
14 not seek psychological or medical treatment for her emotional distress  
15 (*see* Healey Dep. at 218), this is not dispositive. *See Riley*, 631  
16 F.Supp.2d at 1315 (holding that a plaintiff need not prove the  
17 elements of a claim for emotional distress under state tort law order to  
18 recover emotional distress damages under the FDCPA). Therefore, the  
19 court denies DRS's motion for a determination on summary judgment  
20 that Ms. Healey cannot prove actual damages under the FDCPA.  
21

22 Ms. Braham’s deposition testimony makes clear that, although she has not  
23 been medically treated for the emotional distress caused by Ms. Bull’s threat to  
24 garnish her wages, she suffered real and continuing emotional distress damages.  
25 The manifestation of her emotional distress is clear and is certainly not, as the  
Defendants refer to it, “transitory”. ECF No. 27 at 25.

1 Specifically, Ms. Braham testified that as a direct result of Ms. Bull's threat  
2 to garnish her wages, she "cried", "was shaking", and "believed she was having a  
3 panic attack". (Braham Dep. 48:3-20.) This highly emotional aftermath of Ms.  
4 Braham's conversation with the Defendant was witnessed by her husband.  
5 (Braham Dep. 48:16-20.) Based on her continuing fear that her wages would be  
6 garnished as Ms. Bull had told her, Ms. Braham continued to have "anxiety",  
7 "worry", and "upset" for months following the conversation with Ms. Bull.  
8 Plaintiff believed that at any time the Defendants might garnish her paycheck or  
9 bank account. (Braham Dep. 49:16-52:17.)

10 Ms. Braham's detailed testimony regarding the distress caused by Ms. Bull's  
11 illegal statement establishes a basis for finding she is entitled to emotional distress  
12 damages. The amount of emotional damages should be reserved for determination  
13 at trial and the Defendants' Motion for Summary Judgment denied.

## 14 I. CONCLUSION

15 Defendant Bulls own admissions with respect to her statements to Ms. Braham  
16 and garnishment support a finding that the Defendants violated the FDCPA. It is  
17 undisputed that the Plaintiff's testimony regarding the verbal exchange with Ms.  
18 Bull supports a finding that the Defendants violated the FDCPA. The success of  
19 Defendants' Motion for Summary Judgment, if possible at all, rests solely on the

1 Defendants' assertion that the Court should reject altogether the Plaintiff's  
2 testimony and consider all inferences in the Defendant's favor. There is no legal or  
3 factual basis to do so. The Defendants legal analysis of their liability under the  
4 FDCPA is incorrect and there is an issue of fact remaining, although possibly not  
5 material, as to what exactly was said by the parties. Thus, Defendants' motion for  
6 summary judgment should be denied.  
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10 Dated the 6th day of January, 2012.

11 ***Kirk D. Miller, P.S.***

12 s/ Kirk Miller  
13 Kirk Miller  
14 WSBA 40025  
15 Attorney for Plaintiff  
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CM/ECF

I hereby certify that on the 6th day of January, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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